Case Western Reserve Law Review

Volume 7 | Issue 3

1956

Municipal Corporations

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In order to avoid the problem of determining whether oil or gas is being produced in paying quantities, oil and gas leases should provide that after the initial five-year period, the lessor shall have the option of cancelling the lease upon the payment of an amount to be determined by multiplying by a stated number the total value of all oil and gas produced during the twelve months which preceded the exercise of the option.

Condition Precedent in Form of Condition Subsequent

The court of appeals in *Kallins v. Rex*[2] held that a provision in a five-year lease that the lease will be null and void if "it is impossible to secure approval by the Zoning Board of lessee's occupancy" is a condition precedent.[3] Therefore, the five-year lease never became effective though lessee was granted a temporary permit by the Zoning Board of Appeals. The real estate broker who obtained the tenant claimed a commission of five percent of the rental to be paid during the five years. The lower court gave judgment for the broker in an amount equal to five percent of the rental paid prior to suit without prejudice to a suit for any additional installments which might accrue. The court of appeals restricted the judgment for plaintiff to five percent of the rental for two years. The statement by Judge Hurd that if the tenant continues to occupy the premises, then plaintiff as the broker who obtained the tenant should be entitled to five percent of the rental seems reasonable.

Tenant at Will: Rental

The court of appeals in *Vangrow v. Weiss*[4] allowed the landlord to recover on an implied promise the rental which the landlord had informed a tenant at will would be due if the tenant continued in possession after a certain date. There was evidence that the rental demanded was the reasonable rental of the property. Consequently, the amount recovered would have been the same if the action had been brought on quantum meruit.

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MUNICIPAL CORPORATIONS

Municipal Corporations as Political Subdivisions of the State Government

The Ohio Revised Code provides that an appeal bond may not be required when the appellant is "the state [or] any political subdivision

[2] 125 N.E.2d 371 (Ohio App. 1955).

[3] "Words are often used . . . the literal meaning of which would make some fact a condition subsequent to the duty of immediate performance, though the parties really mean to make its non-occurence a condition precedent to such duty," RESTATEMENT, CONTRACTS § 259, comment *a* (1932).

[4] 128 N.E.2d 822 (Ohio App. 1953).

thereof authorized to sue and be sued."[1] In 1928 an appellate court had held[2] that a city was not within the provisions of the section as it then read. Subsequently the statute was amended to add the words, "political subdivision." In *Wolf v. City of Columbus*[3] the Court of Appeals for Franklin County held that municipal corporations, in carrying out many governmental functions, constitute agencies or instrumentalities of the state government, constitute "political subdivisions" of the state, and are within the terms of the statute's exemption.

Transition from Village to City Status — Special Census

The Ohio Constitution establishes the distinction between cities and villages.[4] Its provisions are not self-executing, and the actual method of transition from one to the other depends upon the passage by the legislature of statutes regulating transition.[5] The legislature has done so.[6] Ohio Revised Code sections 703.01 and 703.06 provide for the transition to be made as the result of "any federal census."

The question arose, in *State ex rel. Brubaker v. Brown*,[7] whether a special census made by the Federal Bureau of the Census as provided by the United States Code,[8] at the express request of the mayor of an Ohio village, and the result of which showed the municipal population to be in excess of 5,000, entitled the corporation as of right to be proclaimed by the Secretary of State to be a city. Why the corporation desired a hurried advancement to such status does not appear. There are certainly some financial disadvantages to city status, such as loss of road maintenance by the county. But the village of Kettering desired the transition to take place without waiting for the 1960 decennial census, and the Supreme Court held it to be entitled to it. The applicable statutes are not entirely free from ambiguity, but the court properly held that it should be resolved in favor of expediting rather than delaying the transition, in order to bring about the expressed primary intent of the constitution that all municipal corporations having a population in excess of 5000 should be cities.

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[1] OHIO REV. CODE § 2505.12 (B).

[2] Steubenville v. Reiner, 7 Ohio L. Abs. 324 (Ohio App. 1928).

[3] 129 N.E.2d 309 Ohio App. (1954).

[4] ART. XVIII, § 1.

[5] *Ibid.* See Murry v. State *ex rel.* Nestor, 91 Ohio St. 220, 110 N.E. 471 (1915).

[6] OHIO REV. CODE c. 703.

[7] 163 Ohio St. 241, 126 N.E.2d 439 (1955).

[8] 46 STAT. 25, 13 U.S.C. § 218 (1929).

Incorporation and Annexation: Priority of Proceedings

Frequently it happens in unincorporated areas which are approaching the necessity of acquiring corporate status, that two opposing factions may be found. One desires annexation to an established adjoining municipal corporation; the other advocates independent incorporation. A race of diligence often results. The statutes provide for two primary and one seldom used method of incorporation and for one method of annexation of unincorporated territory. In *State ex rel. Store v. County Commissioners*[9] a group of inhabitants of an unincorporated area had petitioned the township trustees for incorporation. The trustees had taken no action, and a writ of mandamus had been issued requiring them to proceed with an election. A month or so after the filing of the petition with the trustees, but prior to the holding of the said election, an adjoining city filed with the County Commissioners and the Board of Elections proceedings to bring about an election in the same area on the question of annexing it.

The court of appeals granted an injunction to restrain any further proceedings on annexation until the election had been held on the question of incorporation. It relied for its authority upon a precedent in which the converse situation had been presented and in which proceedings for incorporation pending before the County Commissioners had been held to constitute grounds for enjoining subsequently filed proceedings for the same purpose before the township trustees. The result seems logical, just and in accord with the general rule that when there exist courts or other bodies of concurrent jurisdiction the one which first obtains jurisdiction is entitled to proceed free from interference.[10]

Ordinance Restricting Use of Streets By Trucks Held Unreasonable

The B. Trucking Company had its principal place of business in an area of Cleveland zoned for factory purposes. Its trucks were engaged in hauling stone for the construction of the Ohio Turnpike, and it was "necessary" that this operation, and the consequent servicing of trucking equipment operate on a 24-hour basis. There existed residences on the four streets forming the square in which the trucking company's garage was located. Apparently acting at the instance of said residents, the Cleveland City Council enacted an ordinance which prohibited the operation of trucks of gross weight in excess of four tons on any of the four streets between the hours of 10 P. M. and 6 A. M. It was conceded that the ordi-

[9] 124 N.E.2d 836 (Ohio App. 1952).

[10] For an interesting case on a similar issue see State *ex rel.* Ferris v. Shaver, 163 Ohio St. 325, 126 N.E.2d 915 (1955).

nance, if valid, prevented the operation of the trucking company's business between those hours.

Defendant was a driver for the trucking company. He was arrested under the ordinance for operating an empty truck weighing in excess of four-tons gross, at a lawful speed, in a careful manner, with a minimum of noise, on one of the four proscribed streets within the proscribed hours. The gravamen of the offense was the operation of the truck on the forbidden streets within the forbidden period.

The Court of Appeals for Cuyahoga County declared the ordinance unreasonable, arbitrary and discriminatory, and therefore unconstitutional.[11] It held that an ordinance which arbitrarily prohibited the use of these streets, and denied the employer and his employee access to their place of business, *without regard to the manner* of their going and coming insofar as excess noise or unsafe operation were concerned, bore no reasonable relationship to the preservation of the public health, morals, safety and general welfare. Basically, said the court, it was like an ordinance regulating working hours,[12] and unconstitutional for the same reason.

Political Activity by Municipal Employees

Section 143.41 of the Revised Code of Ohio contains various prohibitions upon the activities of officers or employees in the classified service of the state, counties, cities and city school districts. Among them is a provision forbidding such employees to "take part in politics."

Firemen in Shaker Heights, in the classified civil service of that city, sought by initiative petition to place before its council and electorate an ordinance which would establish therein the "three-platoon system" in its fire department. The question was raised whether the circulation of such petitions, the procuring of signatures of qualified electors thereto and the presentation of such petitions to council in accordance with municipal charter provisions constituted political activity by the firemen in violation of the Ohio statute.

The Supreme Court held,[13] one member abstaining, that this activity by the firemen was proper. It conceded that the word "politics" or the expression "political activity," as used in the statute, was susceptible of two meanings. The first meaning to be attributed to it is a broad one, that of public administration and the science of government. The second meaning is a narrower one, that of partisan politics, the securing of public office and the winning of elections for partisan purposes.

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[11] Cleveland v. Antonio, 124 N.E.2d 846 (1955).

[12] Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943).

[13] Heidtman v. Shaker Heights, 163 Ohio St. 109, 126 N.E.2d 138 (1955).

The court held that it is only the activity encompassed in the latter meaning which is forbidden by the statute. While in the future, situations closer to the border line between the two meanings will undoubtedly arise, the decision in this case seems clearly to be correct. A denial of the right to petition one's elected officials for the redress of grievances ought not to be read by implication into any such a statute, and should only be enforced if the intention of the legislature is clear beyond doubt. And even then there is some doubt whether such a prohibition would be constitutional.

Municipal Income Taxes
Preemption by State

The Supreme Court held in *Ohio Finance Co. v. Toledo*,[14] that the state tax law,[15] providing generally for a tax, against the owner, of 5 per cent on the income yield from his intangibles, and for the taxation of the shares of a dealer in intangibles, at 5 mills on their fair value, and that such latter tax should be in lieu of all other taxes on intangibles owned by such dealer, was a premption of the field by the legislature, so that a municipal ordinance imposing an income tax on the portion of the income of such dealer from such intangibles was invalid. The case is more fully discussed in its tax implications elsewhere in this survey.[16]

City Water Supply — Fluoridation

In *Kraus v. Cleveland*[17] the Supreme Court ruled that prevention and control of dental caries is a proper subject for legislation by a municipal council in relation to public health and an ordinance of such a council providing for the fluoridation of water by a municipal water department is within the city's police power, does not infringe upon the constitutional liberties of the citizens and does not contravene the general laws in relation to adulteration or the practice of medicine. The constitutional aspects of the case are discussed elsewhere in this survey.[18]

Charter Provisions May Override
State Prevailing Wage Law

Ohio Revised Code sections 4115.03 *et seq.*, known as the Prevailing Wage Law, provide in substance that persons employed in the construction

[14] 163 Ohio St. 81, 125 N.E.2d 731 (1955).
[15] OHIO REV. CODE §§ 5701.06, 5711.01, 5711.03.
[16] See *infra*, p. 000.
[17] 163 Ohio St. 559, 127 N.E.2d 609 (1955).
[18] See *supra*. p. 000.

of any public improvement by any political subdivision of the state[19] may not be paid less than the "prevailing wage rate" of mechanics and laborers for the class of work called for by the nature of the improvement in the locality where the work is to be performed, as determined by the Department of Industrial Relations. Contracts entered into by such subdivisions must contain provisions whereby the successful bidder and his subcontractors agree to pay at least such prevailing wages.

In *Craig v. Youngstown*[20] the Supreme Court had before it a situation involving the construction by that city of water mains. Work was performed by its own employees, members of its classified civil service. Youngstown has a charter, which, in one of its provisions, declares that "the council shall fix by ordinance the salary or compensation of all officers and employees of the city government." The compensation paid to members of the classified civil service in the city's street department, who were doing the work, had been fixed by ordinance and was less than that provided under the Prevailing Wage Law.

The Supreme Court held that the wages paid by the city were not controlled by the Prevailing Wage Law. First of all, no problem of state legislation affecting local police, sanitary or other similar regulation is involved. The home rule powers of the city under the constitution would govern.[21] To force upon cities rates established by negotiations between private contractors and labor unions would be to deprive the city of its power under the constitution and the statute relating to non-charter municipalities, empowering their councils to fix rates of compensation for employees.[22]

Second, the constitutional provision[23] authorizing the passage of laws fixing and regulating the hours of labor and establishing a minimum wage is not in issue in this case, since the Prevailing Wage Law does not purport to fix minimum wages. That has been done by entirely separate statutes.[24]

Construction of County Subway System For Use by Municipally-Owned Rapid Transit

The space limitations of this survey forbid any extensive discussion of a highly important case[25] decided in an original mandamus action by the Supreme Court involving the constitutionality of the County Subway

[19] See note 3 *supra.*

[20] 162 Ohio St. 215, 123 N.E.2d 19 (1954).

[21] ART. XVIII, § 3.

[22] OHIO REV. CODE § 731.08.

[23] ART. II, Sec. 34.

[24] OHIO REV. CODE §§ 4111.01-4111.16.

[25] State *ex rel.* Speeth v. Carney, 163 Ohio St. 159, 126 N.E.2d 449 (1955).